# Supreme Court of the United States.

No. 98.

DECEMBER TERM, 1867.

THE SOUTH FORK CANAL CO., ET AL., APPELLANTS,

*vs.*

GEORGE GORDON.

STATEMENT OF THE CASE.

This is an appeal from the decree of the circuit court of the United States for the northern district of California, brought by Gordon, the complainant, in that court against the South Fork Canal Company, and others, defendants, to enforce a *contractor's lien*, alleged to exist in his favor under the *mechanics' lien* law of California.

This suit has been pending now over thirteen years, and the controversy itself nearly fifteen years. The suit was begun June 12, 1854, (printed record, p. 44,) but no testimony was taken in it until January 21, 1860, (*ib.*, p. 125,) and the final decree was not rendered until September 11, 1865, (*ib.*, p. 283.)

In the meantime, *the original parties have ceased to have any interest in the controversy.* Others have taken their places.

George Gordon, the original complainant, in the spring of 1858, assigned and transferred his claim in this suit to F. D. Kohler, who afterward, on the 4th day of October, 1859, assigned three-fifths of the claim and lien to John Hume, a lawyer of Placerville, in consideration of "his undertaking to be at all the expense and charges of taking depositions and testimony and procuring the attendance of witnesses in this suit." (Printed record, pp. 119, 120.) This transfer to Kohler, although *denied on oath* by Gordon, May 5, 1862. (*ib.*, p. 121,) was afterwards *admitted and sworn to by him* before the mas-

ter, October 27, 1864, (*ib.*, pp. 262, 263.) On the 5th of May, 1862, Gordon also swore, that on the 31st of December, 1861, he had made an absolute assignment of his interest to Charles Hosmer, who also, on the same day, made a similar oath, asserting his claim and denying the title of Kohler and Hume, (*ib.*, pp. 121, 122.) Nevertheless, it appears that, on the 21st of January, 1860, the first testimony taken in this case was taken by John Hume, who, in pursuance of his contract was, on that occasion, at one and the same time three-fifths owner, procurer of witnesses, the first witness examined, and counsel for the nominal complainant, George Gordon, (*ib.*, p. 125.) All the other testimony on behalf of the complainant was "procured and taken" by Hume, (see printed record, pp. 128, 136, 139, 141, 143, 146, 151, 154, 155, 158, 161, 162, 163, 174, 177,) who acted as counsel for complainant throughout, excepting at the taking of the testimony before the master, where George Gordon was the only witness examined, (*ib.*, pp. 254–263,) and, as before stated, swore that he had not the slightest interest in the controversy, having transferred his interest in it "about five years before (1859) to F. D. Kohler," (*ib.*, p. 263.) In passing, it may be observed that the defendants were not allowed an opportunity to obtain and offer any evidence before the master, (*ib.*, pp. 249–263.) But whether Kohler or Hosmer is the real assignee, it is certain, if we may believe Gordon and the other evidence, that he has now no further interest in the controversy.

On the other hand, the interest of the South Fork Canal Company, the *original defendants*, was divested, under prior judgments and judicial sales, to Thomas H. Williams, under whose title the real parties in interest now hold. (Printed record, pp. 79, 220–240, 61, 91, 117.) They have also the increased equity arising out of the expenditure of $80,000 after their purchase made in order to finish the work, (*ib.*, pp. 168, 169, 172.) The *bona fides* of these judgments and sales is impeached in the bill of complainant, but not a particle of evidence has been offered to sustain the charge.

Admitting now, for the sake of the argument, what is alleged by one of complainant's witnesses, that in the beginning the controversy was a *game of sharps* between Gordon and the South Fork Canal Company, (see Johnson's testimony, *ib.*, pp. 149, 150,) its character has since entirely changed. It is now a contest between assignees on both sides, but of very different characters—between a jobbing and speculating lawyer on the one side, and innocent third parties on the other, who hold title under valid judicial sales, and who, relying on the validity of their title, and being in possession for the last thirteen years, have made large and valuable improvements upon the property.

So much for the present status of the case, and the *personnel* of the present litigants and their respective claims to the favorable consideration of a court of equity.

The *extent* of the controversy has also changed. Under the memorandum judgment of October 10, 1864, and the interlocutory decree of the circuit court, rendered October 13, 1864, the alleged lien was *limited to that division, branch, or extension* of the canal on which the work was done and the materials furnished. (Printed record, pp. 245–248.) But, under the final opinion and decree of that court, the lien has been *extended to the whole canal*, and a sale of the whole has been decreed to pay a claim originating in the contract for the construction of said branch or extension of the canal. (*ib.*, pp. 279–283.)

Under these circumstances it becomes necessary to look closely into *the foundation* of the alleged lien, to enforce which the present suit is brought.

This is a suit in equity, but, notwithstanding, it is brought to enforce a *statutory lien*, a right *strictly legal* in its nature, and it must be judged accordingly. Whether this right exists or not must be determined by *the strictly legal rights* of the parties on both sides.

The foundation of the alleged lien is the written contract of March 10, 1853, (printed record, pp. 30–32,) entered into by George Gordon and Alonzo Kinyon, on the one part, and the South Fork Canal Company, on the other, for the construction of *that part* of its canal from section seventeen to twenty-five, inclusive; or, in other words, for the construction of an extension of its canal from Long Cañon to the South Fork of the American river, (*ib.*, p. 68.)

At the time this contract was entered into, says one of the witnesses, "the canal up to Long Cañon was constructed for the South Fork Canal Company by various contractors, who constructed various sections. It was completed up to that point, and the water running through it, the July or August previous to the time that the contract for the construction of the balance of the canal was given to Gordon and Kinyon." (Chas. Binney's test., a witness for complainant, printed record, p. 155. See also Harney's test., *ib.*, 181; Taylor's test., p. 195; Smith's test., p. 206.) The contract was made for *extending* the canal from the Long Cañon to the south fork of the American river only in order to obtain an *increased and constant* supply of water all the year round. (Smith's test., p. 206; Kirk's test., p. 173.)

Before this contract was entered into, proposals had been received for doing the work according to the specifications attached to the contract, and the contract was awarded to Gor-

don and Kinyon, according to their own showing, *at a higher rate* than was offered by others, because they combined in themselves *greater pecuniary ability* and practical knowledge and experience in the execution of that kind of work. (Harney's test. on cross-exam., *ib.*, pp. 189–190; Taylor's do., *ib.*, pp. 198–199. See also the contract and specification, *ib.*, pp. 30–34).

The first questions which arise are as to the legal nature and character of that contract, and the legal consequences which flow from it.

ARGUMENT.

We contend that the contract, in *its nature*, was *entire*, for the performance of *the whole work* therein specified, and within a limited time, *i. e.*, *on or before the 1st day of July*, 1853. (Printed record, pp. 30–32.)

That *that time* was thereby made of the *essence* of the contract. (*Ib.* p. 32, fol. 110–112; *ib.*, pp. 34, 35.)

That, although partial payments were stipulated for during the progress of the work, according to the estimates of the engineer, (*ib.* p. 31, fol. 109,) yet, nevertheless, the contract of the company was to pay for the whole work, *on the completion of the whole work*, and not before. (*Ib.*, p. 31, fol. 108.)

That any delay in the payment of the estimates by the company was to be compensated, according to an express provision of the contract, by the payment of interest thereon from the time of such non-payment until paid. (*Ib.* p. 32, fol. 113.)

That, under this contract, Gordon and Kinyon could not rescind the contract for real or pretended delays by the company in the payments of the amounts of the engineer's estimates—*the only reason* alleged by them, in their letters of June 7th and 13th, 1853, for rescinding the contract and abandoning the work, and according to which their right to rescind must be judged. (*Ib.*, p. 35, fol. 122, 22, 36–37.)

That, upon this abandonment, under an express stipulation of the contract, the company had a right to declare an abandonment of the contract by the contractor, and a forfeiture to the company of all moneys then remaining due and unpaid. (*Ib.*, p. 32, fol. 110, 111.)

That the company exercised this right and declared this forfeiture in the month of June, 1853. (*Ib.*, p. 72, 186, 200.)

And, consequently, that thereafterward the pretended lien, which this suit is brought to enforce, had no legal basis or existence.

The general law on this subject is very fully stated in 2 Par-

sons on Contracts, pp. 30–34, and notes; *ib.*, 191–193. See also the case of *Shaw* vs. *The Turnpike Company*, 2 Penn. (Penrose & Watts) R.. p. 454, which furnishes a striking analogy to this case in several particulars.

When the contract is *entire*, and there has been a failure by one party to comply with its terms, it is well settled that he cannot recover for partial performance, by a suit on the contract. Nor can he recover in such case by an action *in any other form*, when the contract *expressly provides for and authorizes a forfeiture* of all claims for anything less than a full performance.

Equity cannot relieve against *the forfeiture* declared in this case, *in order to found a lien* under the State law to the extent of *the part* performance. "Courts of justice can only carry into effect such contracts as parties have made. They cannot make contracts for them, or alter or vary those made by them." (2 Parsons on Contracts, pp. 33–34.)

In the beginning, the contractors in this case, with full knowledge of the company and its resources, took the risk of the company's ability to pay them in full, AFTER *the full completion of the work, on or before July* 1, 1853. The company, on the contrary, took no risk as to the ability of the contractors to finish the work by that time. It not only required a schedule of Gordon's property, and to be satisfied of Gordon's pecuniary ability, but it required a bond of $50,000, as security for damages in case of non-performance by that time. (Printed record, pp. 190, 198, 199, 34, 35.) The company also reserved the right to declare intermediately a forfeiture of all moneys remaining due and unpaid for any breach of the contract by the contractors, as a means of insuring its performance within the stipulated time. (*Ib.*, p. 32.)

Now, if this view of the nature of the contract and of the law applicable thereto is correct, then it is wholly immaterial whether the allegations of *delay in the payment of the estimates*, which were made the basis for rescinding the contract by the contractors, are true or not.

But their truth is denied by the answer, (*ib.*, p. 72,) and the contrary is fully established by the evidence for defendants.

It is fully shown that, on or about the 1st of June, 1853, $4,000 of the second estimate were paid, and that the balance, $12,000, was tendered within a few days afterwards. (See testimony of Harney, *ib.*, pp. 184–185, 190–191; Smith's test., *ib.*, pp. 208, 210; Hume's test., pp. 125–126; Batterman's test., p. 156, fol. 492, p. 157.) It is also shown that *Gordon had become satisfied of his inability to complete his contract within the stipulated time*, and was seeking some specious *pretext* for aban-

doning the contract, and for thereby relieving himself from the obligations and provisions of his contract, and from the penalty of his bond.

See Law's test., pp. 133–134; Johnson's test., pp. 147, 148, 149, 150; Baker's test., p. 162; Hewitt's test., p. 183; Harney's test., p. 186–187; Taylor's test., p. 203; Smith's test., p. 206, fol. 645.

That he *could not* have completed his contract within the stipulated time, that is, between the 7th of June and the 1st of July, 1853, is shown by the fact that Kirk, who subsequently took the contract for the same work, and began just where Gordon left off, was engaged one hundred and twenty days, according to one witness, (Taylor, p. 160,) and according to Hewitt, (p. 181,) from April 25 to the latter part of September, 1854; or, according to Kirk himself, from February or March, 1854, (p. 163.) The work was to be done by the 1st of July, 1853, and on the 7th of June, 1853, he had but twenty-three days left. It also appears that *Gordon was trying to get an extension of time for completing his contract, which the company refused.* (Printed record, p. 72; Newell's answer, p. 100, fol. 319; Hewitt's test., p. 182, fol. 574.)

His policy, therefore, was to find *some pretext* for abandoning the contract. His first complaint was a *want of grade-pegs;* but that there was no foundation for this is clearly shown by the testimony of the engineer and his assistants. (See A. J. Binney's test, pp. 215, 217; Turner's test., pp. 211–213; Hewitt's test., pp. 177, 181; Johnson's test., pp. 148–149; Baker's test., p. 144, fol. 453, &c.)

This ground of complaint was so unimportant at the time, even in the judgment of Gordon himself, that it was forgotten in the letters of June 7 and 13, 1853. The only ground then alleged for rescinding the contract and abandoning the work was *want of prompt payment of the engineer's estimates,* (pp. 35–36.)

The real motive for Gordon's conduct will be found in the foregoing facts, and in his own estimate of the nature and character of his contract, as testified to by W. H. Smith: "I recollect of having a conversation with Mr. Gordon once or twice with regard to the contract. What the conversation was I can't bring to mind. I recollect of his expressing that *he could not conceive how he was led to signing such a contract; that* IT WAS THE MOST ABSURD THING HE EVER DID IN HIS LIFE; that he was throwing himself into the power of the engineer of the company, and that the engineer could control him. This is all I remember." (Smith's test., p. 208, fol. 652.)

This view is also sustained by the testimony of Johnson, one

of the witnesses for complainant. On cross-examination, he says: "At that time everything was coming to a halt. Mr. Gordon had had some difficulty before that with the company about estimates, and had requested me to go up and make this survey. * * * I don't know anything personally about the estimates, except what I heard from Mr. Gordon, but I am satisfied, from what I heard from him and the directors, that there was a dispute about it. * * * At that time, I can't say that I knew what Mr. Gordon thought of his own ability to complete his contract, but *I thought he had the impression himself that he could not do it in the specified time.* I was under the impression that *it was a grand race on the part of the directors to make him forfeit his contract, and a grand struggle on his part to make them guilty of laches on their part.*" (*Ib.*, pp. 149–150.)

Therefore, whether this branch of the case is regarded in *point of law* or in *point of fact*, the conclusion is inevitable that Gordon had no right to rescind his contract and abandon the work, as he did; that, by so doing, he incurred a forfeiture, under the contract, of the amounts then remaining due and unpaid, and, if so, that they cannot be made *the basis of a lien* under the mechanics' lien law of California.

## II.

But admitting, for the sake of the argument, that a lien *did attach* against the canal in the outset, the next inquiry is, whether it has been *preserved* and *continued* under the provisions of the lien law of California.

On this point we contend that *it has not been continued, but has been lost.*

1. It was lost and discharged by *the release* to the company, given by Kinyon, the partner and co-contractor of Gordon, dated June 28, 1853. (See Printed Record, p. 40, 41.)

But it is contended by the complainants that this release was fraudulent and void. This is denied by the defendants, in their answer, (*Ib.*, p. 75, 76,) and a mass of evidence is submitted tending to show that, however fraudulent the conduct of Kinyon may have been towards his partner, Gordon, the company were not parties to the fraud; that, as to them, it was an honest and fair settlement of the dispute between the company and the contractors, and that it was fully within the scope of the authority of Kinyon, as a partner and co-contractor, to make it. See the defendant's evidence on this subject. (Harney's test., *ib.*, p. 187–189, 192–194. Tay-

lor's test., *ib.*, p. 196–198; *Ib.*, p. 200, 201, 204; Smith's test., p. 206–208, 209, 210. Binney's test., p. 216, 217.

If so, then there is an end of this controversy. But if, on the contrary, that transaction should be regarded as fraudulent and void, then we contend—

2. That it was lost by *the voluntary and needless dismissal of the first action* brought by the contractors against the defendants, in the fourth judicial district of California. This action was brought June 23, 1853, (Printed Record, p. 8, fol. 25,) and was discontinued June 8, 1854, (*Ib.*, p. 10, fol. 35; *Ib.*, p. 77, fol. 248.)

The ground of that dismissal was, that the defendants had pleaded the release of Kinyon in bar of the action. Now, the argument on this point resolves itself into this dilemma: The release was either honest or dishonest, in point of fact; it was either valid or void, in point of law. If *honest and valid*, in point of fact and of law, then the release was a valid bar, and the discontinuance of the action was an absolute necessity, because no claim existed, and, consequently, no lien existed which could be enforced.

If, on the contrary, the *release was fraudulent and void*, then, in the courts of California, where the distinction between suits at law and in equity and the forms of the common law are abolished, and an equitable right or defence is as valid as a legal right or defence, the release was no bar to the action, and the suit might have been maintained and the lien enforced on other grounds, if it existed. But that action was dismissed, and with it all possibility of enforcing a lien against the canal of the company, as will be shown in the next point.

3. The lien was lost by the joint abandonment of the first suit, and *the failure of the complainant to institute the present suit until after the lapse of more than one year from June* 7, 1853, the date of the rescission of the contract and the abandonment by the contractors of all claim against the company for work done or materials furnished to the canal after that date.

The mechanics' lien law of California provides that "*such lien shall not bind* the buildings or wharf, [bridges, ditches, flumes, or aqueducts, constructed to create hydraulic power, or for mining purposes,] *for a longer period than one year after the work is done* or material furnished, *unless suit be brought in a proper court* to enforce the same *within that time.*" (Compiled Laws of California, edit. of 1850–1853, p. 808, 811, 812.)

In this case the work never was completed by Gordon;

but, waiving that point, and assuming that it was, so far as the right to a lien is concerned, the question arises, *When was it completed*, so far as concerns this controversy?

The necessary answer to this question is, that *the work was completed, under the contract, when the contract was rescinded and the work abandoned.* But when did this occur?

This occurred June 7, 1853, and is so charged in the bill of complainant, as follows: "Your orator and the said Kinyon did, on the 7th day of June, 1853, notify said company by letter that *they considered the said contract at an end, and that they would no longer continue the performance of it*, but offered, for the sake of enabling the company to make arrangements for the completion of the work, to continue their men at work for six days further, *at their own expense*, a copy of which letter is hereto annexed and marked 'B,' and to which, for greater certainty, your orator prays leave to refer. And your orator is advised and humbly *insists that, from the time of sending said letter* to the said company, *the said contract was abandoned, and the connection between your orator and the said Kinyon dissolved*, and any authority which either of them had to bind the other by his acts was revoked by operation of law, and that such was the understanding between your orator and the said Kinyon." (Printed Record, p. 5, fol. 16–17.) "And your orator further shows that, in pursuance of the proposal contained in said letter of the seventh of June, &c., your orator and Kinyon continued the employment of a large force of laborers, &c., *for a week after the said rescission of said contract*, AT THE EXPENSE OF YOUR ORATOR," &c. (*Ib.*, p. 6, fol. 18.) "And your orator further shows, *that at the time your orator and the said Kinyon stopped the work on said canal, on the seventh of June, as aforesaid*, they had performed about one-half of the whole labor to be performed for the completion of the whole of said work," &c. (*Ib.*, pp. 6–7.)

"Your orator further shows that, *after the work under said contract had been entirely abandoned*, &c., various negotiations were had between your said orator and the said company, aiming at a compromise of their difficulties wherever your orator acted solely for himself," &c. (*Ib.*, p. 7, fol. 21.)

"And sometimes the said defendants, or some of them, allege and pretend that the said South Fork Canal Company had not, prior *to the rescission of the said contract on the seventh day of June*, 1853, broken said contract," &c. (*Ib.*, p. 14, fol. 47.)

The material parts of schedule B, before referred to, are as follows:

"PLACERVILLE, *June* 7, 1853.

"*To the Directors and Officers of the South Fork Canal Company:*

"GENTLEMEN: * * We have presented our bill on the 7th June, for the work done in May, and the amount has not been paid. We now beg to give notice that the condition of the contract not having been complied with in this, its most important particular, we *declare it annulled and at an end, and are no longer parties thereto.*

"We wish to say, second, that we will, for six days longer from this date, continue the work undertaken by us, *at our own risk*, and *shall not ask for pay beyond this date, unless the company choose, from their own sense of honor, to pay us*, and this for the purpose of allowing the company to make other arrangements, without interrupting the work; and—

"Thirdly, Although *this abrupt termination of our contract* will involve to us a loss of $40,000, expended in machinery, wages, and for general purposes, we shall claim no damages, but leave the settlement to the company's sense of right and justice, *asking payment only for the work done to the evening of the 7th.*

"We simply terminate the contract, from the fear that the company will allow us to make excessive expenditures, and then leave us *embarrassed*, by *their want of punctuality in payment*," &c.

(Signed) "GEO. GORDON & KINYON,
"By GEO. GORDON."

(*Ib.*, p. 35, 36.)

The contract must therefore be regarded as having been *rescinded*, (as far as the contractors could do it.) from and after June 7, 1853. *All work done* and *materials furnished after that date were a free gift* by the contractors to the company. It was a *gift executed*, after the rescission of the contract, in pursuance of an offer made, with a view to induce a compromise, and in regard to which, neither under the offer nor under the gift executed, can the contractors make any claim in law. They must stand or fall by their claim under the contract up to the date of its rescission, and can make no claim for work or materials after that date.

Nevertheless, it may be argued that Gordon, by his letter of June 13, 1853, attempted to withdraw this offer and gifts, and to put himself in a position to claim for the work done and materials furnished during the six days, from the 7th to 13th of June, 1853. The essential part of that letter is as follows

"*June* 13, 1853.

"*To the President and Directors of the South Fork Canal:*

"GENTLEMEN: In our letter to you of June 7th, delivered by Mr. Hume, I offered sundry advantages to you, such as a waiver of damages of [if?] amount of work done was paid for, &c., continuing the work six days, to give you opportunity to arrange with us or our men, in case you did not want the work interrupted. No action having been taken or answer given to that letter, and the six days having elapsed at 4 p. m. to-day, *we beg to withdraw the whole of it*, EXCEPT *that part which declares our contract broken, nullified, and ended*, and do withdraw it accordingly. The *offers* and *declarations* contained therein were *voluntary*, and *having met with no response*, it *is competent for us to withdraw them and leave our position exactly as though they had not been written.*" (*Ib.*, p. 36–37.)

This language is vague, and it is by no means clear or certain *that at that time* he intended to make a claim for work done or materials furnished between the 7th and 13th of June.

But whatever may have been his intention, he could not do so, as we have already seen. It is true the notice of lien claims for work and materials up to June 13th, 1853. (Printed Record, pp. 64, 65, 219, 220;) but inasmuch as the lien is claimed in behalf of *Gordon and Kinyon*, and *all connection between them after June 7th*, 1853, *is disclaimed*, this is simply an error, and shows that the lien must be limited to what was done by them, under the contract, up to June 7, 1853. But however this may be, there can be no *legal* claim for anything done or furnished after that date.

This is impliedly admited by the interlocutory decrees of October 10th and 13th, 1864—:

"The case will therefore be referred to a special master, to take and state an account of the value of the *work performed and materials furnished*, as aforesaid, by Gordon and Kinyon, or either of them, *under the contract of March* 13, 1853, and report the same to the court." (*Ib.*, p. 246, fol. 768.)

"It is further ordered, adjudged, and decreed, that it be referred to Henry C. Hyde, Esq., a master hereby especially appointed for that purpose, to take and state an account of the value of the *work performed and materials furnished*, as aforesaid, by the said Gordon and Kinyon, or either of them, *under said contract of March* 16, 1853, and report the same to this court with all convenient speed." (*Ib.*, p. 247, 248.)

Now, it is evident that no legal claim can be made *under a contract* for work done or materials furnished *after that contract has been rescinded.*

The result of these considerations, therefore, is that no

valid claim which can be made the basis of a lien in this case can exist for any work done or materials furnished *after* June 7, 1853. The work done and materials furnished in this case must therefore be regarded as *completed* at that date.

Now, as we have already seen, it is provided by the mechanics' lien law of California, "that no lien given by it shall continue *for a longer period than one year after the work is done or materials furnished, unless suit be brought* in a proper court to enforce the same *within that time.*"

The first suit brought to enforce this lien was discontinued June 8, 1854, (Printed Record, p. 10, 77,) that is, *more than one year after the completion of the work;* and the present suit was not brought until June 12, 1854, (*Ib.* p. 29, fol. 100; p. 44.) a period still later. The lien, therefore, had been lost when this suit was brought to enforce it.

The case of Green *vs.* The Jackson Water Company, 10 Cal. Rep., 375, is a case of this kind, in which it was held that the lien was lost by a failure to bring suit in time to enforce the lien.

It is also held that this class of liens being the creations of statute, to create or maintain them, the provisions of the law must be strictly complied with. (Walker *vs.* Hans Hijo, 1 Cal. Rep., 185, 186; Bottomly *vs.* Grace Church, 2 Cal. Rep., 91.)

(See also analagous decisions in other States. Hern *vs.* Hopkins, 13 Serg. & Rawle R., 269; Rahe *vs.* Zeigler, 3 Watts & Serg. R., 258–259; Jones *vs.* Alexander, 13 Smedes & Marshall R., 627; Shaeffer *vs.* Weed, 3 Gilman R., 511; Piper *vs.* Ward, 8 Blackford R., 252; Carson *vs.* White, 6 Gill R., 27–29; Green *vs.* Ely, 2 Green (Iowa) R., 508.)

## III.

But supposing the lien to have been *continued*, the next question is, *To what does it attach*—to the *part*, branch, or division of the canal on which the work was actually done, and for which the materials were furnished, or to the *whole canal?*

The interlocutory decree in this case confined it to the part, but the final decree extended it to the whole canal. (Printed Record, p. 280.) In this, we allege there was error.

The court below was misled by a false analogy, supposed to exist in this case between a *house* and a *canal.* "The canal," says the court, "is to be regarded as an *entire thing*, as

a *building* is to be regarded to which additions or repairs are made. The lien is obviously not restricted to the wing added, or to the chamber or roof repaired, but extends to the whole structure." (*Ib.*, p. 280, fol. 880.)

The principle of justice underlying the mechanics' lien law is, that the *work done* and *the materials furnished* shall *remain a security* in the hands of the employer, for the payment of the laborer and the material-man, which payment is enforced by giving them a lien against the thing constructed, prior and paramount to all other claims.

This principle is well stated in the case of *Hunter v. Blanchard*, (18 Illinois Rep., R., 323,) cited in Appellees' Brief in this case:

"The object of the law is to allow the party to *pursue the thing actually furnished.*" * * * "The *very essence* of the lien created by this statute is *the furnishing of the materials of which the building is constructed.* The act *continues in the party* furnishing the materials of which the building is erected, *a quasi property* in those materials and others with which it has been commingled in *the building*, and allows him to follow it, thus transformed, for the purpose of getting his pay." (*Ib.*, pp. 323, 324).

The difficulty lies in the practical application of the principle in many cases; as for example, where the work done and the materials furnished become *inseparably incorporated with prior work and materials.* There, *from the necessity of the case*, the lien attaches *to the new whole* thus formed. But where, from the different nature of the thing, it consists of a number of parts, each complete in itself, and capable of being used separately or jointly as parts of a connected whole, *no such necessity exists;* and the lien, in strict conformity with the principle of justice on which it is founded, may be, and ought to be, confined to the part in which the work has been done and for which the materials have been furnished.

A house or building, from its nature and uses, is *generally* an *entire thing*, and, as in the case supposed by the court, where a wing is added, or repairs are done to it as a whole, *the new part* becomes *so incorporated* with *the old* part, that it is not possible, consistently with the nature and use of the thing, to separate them, and to restrict the lien to the new, separate and apart from the old. In such a case the law yields to this practical necessity, and allows the lien to attach to the whole. But it is evident that if it were possible to make the separation, the principle of justice underlying the mechanics' lien law would require it to be done; and it is done in the case of a block of houses so constructed as to

be used together as a whole, or used separately as several and distinct houses. In such a case, work done and materials furnished for the erection of a new building, in pursuance of the original plan for the whole, would be regarded as a separate and distinct house, and the lien for such work and materials would be restricted to the new building, and not extended to the whole block. In other words, the law makes the separation when it is possible to make it, and extends the lien to the whole only when, from the necessity of the case, it is impossible to make it. In the practical application of the mechanics' lien law, any departure from its fundamental principle must be required, and can only be justified, *by necessity*—a necessity existing either in the nature of the thing or in the special facts of the case.

In the case in hand the subject-matter of the lien is a *canal*. In the judgment of the court it is assumed that it is *an entire thing*.

On the contrary, the evidence shows that it consists of *a number of separate parts*, constructed at different times, and fed with water from different sources.

In the answer, the defendant "avers that the works of said company were *divided into two separate sections* or ditches, one called and known as the *upper canal*, extending from Long Cañon to the south fork of the American River, and the other known as the *lower canal*, extending from the Long Cañon to the main reservoir; and all the work done or materials furnished by Gordon and Kinyon were done and furnished upon and for the *upper canal*." (Printed Record, p. 76, fol. 246.)

"The canal, up to Long Cañon was constructed for the South Fork Canal Company by various contractors, who constructed various sections; it *was completed up to that point*, and *the water running through it, the July or August previous to the time that the contract for the construction of the balance of the canal was given to Gordon and Kinyon*." (Binney's test., *Ib.*, p. 155.)

Kirk had "a claim against the company for $65,000; $55,000 of it was for work and labor done" on this first branch of the canal. (*Ib.*, p. 169, fol. 534.)

"At the time the contract was entered into with Gordon and Kinyon, the canal was completed, or nearly so, from the main reservoir to Long Cañon, a distance of about sixteen miles. *Before this contract was entered into, this part of the canal was receiving water and was in use.*" (Harney's test., *Ib.*, p. 184.)

"The purpose of that contract, [the contract with Gordon

and Kinyon,] was the completion of the upper nine miles of the canal, entending from Long Cañon to the south fork of the American river.

"*At that time the work was completed, and water running in the canal from Long Cañon to the main reservoir near Placerville, a distance of* 16¾ *miles.*

"Prior to making the contract the water had been run through the canal, except the upper mile and two-thirds, for about two months." (Taylor's test., *Ib.*, p. 195.)

Thus, it appears that the lower division of the canal was a unit, complete in itself, and was supplied with water from other sources than the south fork of the American river at the time and prior to the contract made with Gordon and Kinyon for the construction of the upper canal.

This conclusion is also confirmed by the adverse proceedings against the South Fork Canal Company, in 1853, under which the present owners of the canal hold it. In them the works of the Canal Company are described as consisting of *several distinct parts*, viz: "*A flume*, four feet wide, three feet deep, and *about sixteen miles long*, extending from Long Cañon to the large reservoir above Placerville; also, *a ditch and flume* extending from the said reservoir to Coon Hollow Ridge; *also the three distributing ditches;* also the large reservoir before mentioned, and the small reservoir on Coon Hollow Ridge, and all the other works belonging thereto, as the property of the within-named defendant," &c. (*Ib.*, 235–238; Deed from Sheriff Buel to Thomas H. Williams, pp. 220–221.)

It is no answer to this view of the case that the object of making the extension of the Canal from Long Cañon to the south fork of the American river was to obtain an increased or constant supply of water, or that the upper division of the canal would be of less value if disconnected from the lower division, than if used in connection with it, as testified by Kirk. (Printed record, p. 173.)

No doubt the two parts would be more valuable if used in connection; but that fact does not make them necessary and inseparable parts of one and the same unit, or create any necessity, in the nature of things, in reason or in law, why work done or materials furnished for the construction of the one part should be made a lien on the other. It would be just as reasonable to make a claim for work done on the lower division of the canal a lien against the upper division, as to make, (as is done in this case,) such a claim for work done on the upper division a lien upon the lower. In the first case supposed, the work having been done first, and the claim filed first, it would take priority, and thereby defeat the object and purpose of the law in regard to work done on the upper division.

The lien law of California provides that "all master-builders," &c., "shall have a lien," &c., "*upon the building* or wharf [ditch, flume, *aqueduct*, &c.] WHICH THEY MAY HAVE CONSTRUCTED OR REPAIRED, or for which they may have furnished materials of any description, *to the extent of the labor done* and *materials furnished*, or both." (Compiled Laws, ed. 1850–'53, pp. 808, 811–812.)

THE THING DONE OR FURNISHED, on the one side, is to *remain* as security for the payment of what is done by the other side. Thus, it appears that the intention of this law is in strict conformity with the theory or fundamental principle of every mechanics' lien law, and, in a case like the present, where the two divisions of the canal are separate and distinct, it is a harsh, unnecessary, and unjust construction and application of the law to extend the lien for work done and materials furnished in the construction of a separate part of the canal to the whole canal.

A canal situated as this canal was, is like a turnpike road, or like a railroad, complete and perfect in itself up to a given point, from which an extension of the road is projected to another point, by reason of the increased advantages which may be secured thereby. Or, it is like a main road, either railroad or turnpike road, which it is supposed will be benefitted by the construction of a branch road to connect with the main stem. The extensions or branches of these roads, in the cases supposed, considered in themselves, might be of comparatively little value, while, in connection with the other parts of the road, they might be of great value, not only in themselves, but of great advantage to the main roads.

Now, in such cases, suppose such extensions or branches to be undertaken, and a mechanics' lien law to exist, giving a lien for work done or materials furnished in the construction of such extensions or branches. can it be supposed for a moment that any rational interpretation of such a law, IN THE ABSENCE OF EXPRESS WORDS, would authorize a lien against the main roads for work done on the branches or extensions of such roads? And yet, that is just what has been done by the final decree in this case.

The error consists in treating that as *entire* which is not entire; in treating that as *inseparable* which is easily and readily separable; in extending a lien which is given for one thing to another and a different thing, without necessity, and contrary to the theory and fundamental principle of the law which gives the lien at all.

JOHN A. WILLS,
*Appellant's Counsel.*

# Supreme Court of the United States.

JACOB TOME, THOMAS M. ABBOTT AND DANIEL SHURE, PLAINTIFFS IN ERROR.

*vs.*

JOHN DUBOIS AND ELIAS S. LOWE.

*In error to the Circuit Court of the United States for the District of Maryland.*

## BRIEF OF THE DEFENDANTS IN ERROR.

DUBOIS and LOWE, the Defendants in error, were the Plaintiffs in the Court below, in an action of trover instituted by them against Tome, Abbott and Shure, the Plaintiffs in error, to recover damages for the conversion by them of certain pine logs or saw logs, and certain planks, which the Plaintiffs alleged to be their property.

At the trial of the cause evidence was offered on the part of the Plaintiffs below, that on September 30th, 1861, several booms on the Susquehanna river were carried away by a freshet, and a large quantity of logs for lumber were swept down the river; that telegrams were at once sent down the river to various places, and among others to Port Deposit and Havre de Grace, to the Postmasters in said places, requesting them to have the logs caught and saved for the owners, and that "under such notices," the Defendants caught and saved a quantity of said logs and at once commenced to saw and convert them into lumber. Evidence was also offered, that a few days after the freshet, the owners of the logs appointed a committee of three persons to go down the river and arrange with persons who had saved logs, with full

authority to sell the same; that on the 7th or 8th October, 1861, this committee went to the saw mill of the Defendants about seven miles from Havre de Grace, and saw some of said logs there; that said committee offered to sell to the Defendants all the logs between Safe Harbor Dam and Havre de Grace, which included the logs then in the possession of Defendants, but the parties could not agree as to the terms of sale; that Defendants were then engaged in sawing said logs, and had prior to that time sawed some of them, and that the committee prohibited all further sawing thereof; that they estimated the lumber which had been sawed at from 40,000 to 200,000 feet; that they made several visits to the mill of Defendants, and on their last visit, which was in December, 1861, and was for the purpose of ascertaining and measuring the whole amount, there were in their judgment and by their measurement, 400,000 feet of sawed lumber, and 100,000 feet in logs. Evidence was also offered, that on October 26th, 1861, the Plaintiffs bought all of said logs from Safe Harbor to Havre de Grace from said committee, and settled with them therefor; that on the next day the Plaintiffs notified Tome, one of the Defendants, of said purchase, and he having refused to pay them for the logs which had been sawed, they demanded possession of all the lumber sawed and unsawed in the Defendants' possession and prohibited the sawing of any more, but he denied their ownership, alleging that the logs and lumber had not been scaled and delivered to them; and that after the logs had been scaled and the quantity of lumber estimated by the committee in December, 1861, the plaintiffs made another application to Tome without success, he referring them to Shure, a co-defendant, of whom they had made repeated demands, and received repeated refusals. The Plaintiffs also gave evidence, that said logs when sawed, were worth from $13 to $16 per thousand feet.

It was offered in evidence on the part of the Defendants, in the Court below, that after the receipt of the notices by telegraph, they commenced to save said logs as they were brought down by the freshet, and with the expectation of becoming the purchasers of them, did saw and convert into lumber the said logs as fast as they were recovered, and directed the man at their saw mill to keep an account of the same; that they had converted about twenty-two logs into lumber, when said committee came to the mill, and objecting to the manner of keeping said account, gave directions as to the keeping of the same in a different manner; that of said logs when so sawed into lumber they had sold three canal boat loads on the 18th and 25th of October, 1861, and

received the money therefor, at the value of $11 per thousand feet; that about 780 logs was the whole amount of the logs so recovered and sawed by them, and that from the moment they heard of the sale of said logs by the committee to the Plaintiffs, they ceased either to catch or saw said logs; that five logs sawed would make a thousand feet of lumber; and that it was worth $3 per thousand to saw it, and $5 per thousand to save it. The Defendants also proved, that when called on by said committee after they had made their final estimate and measurement of said lumber, for an account of the logs so caught and manufactured into lumber, they expressed a willingness to furnish such account, and to pay therefor to said committee, for themselves or for the owners, but would not furnish an account for nor settle with said Plaintiffs, whom they refused to know in the matter.

The Plaintiffs in error then prayed the Court to give to the jury the five instructions to be found on pages 7 and 8 of the printed record, but the Court refused to grant the said instructions, and gave to the jury the instruction headed, "Court's Instructions," on page 8 of the printed record. The Plaintiffs in error excepted.

It is contended for the Defendants in error, that the rulings of the Court below were correct for the following reasons.

1st. The 1st instruction asked by the Plaintiffs in error presents the proposition, that if they took the logs into their possession and sawed them into boards without the consent of the original owners, then the said taking and sawing was a tortious conversion of said logs, for which they (the Plaintiffs in error) became responsible to the said original owners in trover, and the Defendants in error were not entitled to recover, notwithstanding the jury should find that after the said conversion, the Defendants in error purchased all the interest of said original owners in said logs.

It will be observed, that this proposition, does not rest on the ground of any adverse possession of the logs with claim of title, by the Plaintiffs in error. They could not ask for an instruction upon any such hypothesis of fact, because there was no proof of such adverse holding and claim. On the contrary, the evidence was, that they admitted the title of the original owners, and proposed to purchase from them, but had not been able to agree on the terms of purchase up to the time when the Defendants in error became the purchasers.

It will also be observed, that this proposition does not present the question, whether the Defendants in error could recover in trover, for a conversion which took place before they acquired

title. If this had been its meaning it would have been sufficiently gratified by the instruction given by the Court below, which put the right of the Defendants in error to recover, exclusively on the finding by the jury of a demand by them and a refusal to deliver to them, subsequently to their purchase.

The true meaning of the instruction prayed for, is broadly, that if the facts recited in it should be found by the jury, then the Defendants in error could not recover in trover at all, even upon proof of a conversion as to them, by demand and refusal after their purchase. This being its manifest meaning, the instruction was properly rejected by the Court below.

It is true that the taking possession of the logs and the sawing them into boards by the Plaintiffs in error, without the consent of the original owners, would amount in law to a tortious conversion if those owners chose to sue in trover for the conversion. But it was for them to decide whether they would or would not consider and treat those acts as a conversion; and the Plaintiffs in error could not by their wrongful exercise of an act of ownership over the property, compulsorily divest the owners of their title. The owners had a clear right either to sue in trover for damages, or to waive the tort, and assert their title to the property and their right to its possession, by replevin if suit was necessary, or by sale, or by any other lawful act of ownership. By the purchase from them and the payment of the purchase money, the Defendants in error acquired the general property in the logs, and thus became entitled in law to the possession; and while they might not have the right to sue in trover for a conversion which took place before their acquisition of the title, they had a clear right to demand the property of the Plaintiffs in error, and hold them liable for its conversion, if they refused to give it up on such demand. By their refusal, they would be guilty of a conversion, as against the Defendants in error.

In support of these views, and of the general proposition that where persons having possession of property not their own, have done acts in reference to it, which the owner may, if he so choose, treat as a tortious conversion, he has also the right to sell the property, and his vendee may upon demand and refusal, maintain trover, the following authorities are referred to.

Hall *vs.* Robinson, 2 Comstock, 293.
Hicks *vs.* Cleveland, 29 Barbour, 573.
McGinn *vs.* Warden, 3 E. D. Smith, 355.
Webber *vs.* Davis, 44 Maine, 147.
Cartland *vs.* Morrison, 32 Maine, 190.
Carpenter *vs* Hale, 8 Gray, 157.

Parsons *vs.* Dickinson, 11 Pick. 354.
Phillips *vs.* Robinson, 4 Bingham, 106; 13 E. C. Law Rep. 422.
2 Saunders' Pleading and Evidence, 8 7 marginal.
Morgan *vs.* Bradley, 3 Hawks, 559.
Seward *vs.* Hofflin, 20 Vermont, 144.

2nd. The 2nd, 3rd and 4th instructions asked for by the Plaintiffs in error relate to the measure of damages. They do not present any questions of law for the decision of this Court, as the 2nd and 4th were substantially adopted in the instruction given by the Court below, and the 3rd, which was founded on the perishable character of the logs, finds no evidence in the record for its support.

3rd. The 5th instruction asked by the Plaintiffs in error was to the effect, that if they qualified their refusal to comply with the demand of the Defendants in error for the plank or lumber, "by stating their readiness and willingness to account to those who were the owners at the time of the taking and sawing," then the Defendants in error were not entitled to recover. Manifestly the Court below was right in refusing this instruction, because the statement made by the Plaintiffs in error did not "qualify" their refusal, in so far as the Defendants in error were concerned. As to them, the refusal was absolute and peremptory; and the alleged willingness of the Plaintiffs in error to account with other persons, was but a repetition in a new form, of their original denial of the ownership of the Defendants in error, and of their refusal to know the said Defendants in the matter. That such a refusal was a conversion and a waiver of any tender, see,

Thompson *vs.* Trail, 6 Barn. & Cress. 26, (13 E. C. Law Reports, 29.)
Boardman *vs.* Till, 1 Camp. 410; note.

4th. The instruction given by the Court below directed the jury in substance, that if the logs and planks found at the mill of the Plaintiffs in error, were sold by the owners to the Defendants in error and were after the purchase by them demanded of the Plaintiffs in error and that said Plaintiffs refused to give up the same, then the Defendants in error were entitled to recover such sum as the jury might find the logs and plank were worth at the time of such demand and refusal, with interest from that time, deducting the cost of saving and sawing the logs, if such saving and sawing were done on the request or by the sanction of of the owners or their committee.

It is submitted that the correctness of this instruction is fully maintained by the views above stated and the authorities cited in their support. The direction as to the measure of damages is substantially what the Plaintiffs in error asked for, and is in accordance with the general rule in England and in this country.

Hepburn *vs.* Sewell, 5 Harris & Johnson, 211.

I. NEVETT STEELE,
*for Defendants in Error.*